MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE

LAW SCHOOL OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. 35 CENTS PER NUMBER

NOTE AND COMMENT

INJURIES ARISING "OUT OF" AN EMPLOYMENT.—An employee's duties take him into the streets where he is injured by being run into by an automobile or other vehicle; has he ground for recovery of compensation under the usual WORKMEN'S COMPENSATION ACT providing for an award for injuries "arising out of and in the course of his employment"? Since he was in the street in pursuance of his duties and not in going to or from work, it is clear that the injury was one arising in the "course of" the employment. But did it arise *"out of"* the employment?

The English Courts had made this last question turn largely upon the degree to which the employee was exposed to the risks of the streets. Thus in *Pierce* v. *Provident Clothing and Supply Co.* [1911] 1 K. B. 997, where the claimant was awarded compensation, the Master of the Rolls said: "This work of course necessarily involved spending a great part of the day in the streets in this triangular area; and in the course of his duties he was beyond all doubt much more exposed to the risks of the streets than ordinary members of the public". And in *Sheldon* v. *Needham*, 111 L. T. 729, 7 B. W. C. C. 471, where the claimant, a domestic servant, was injured by slipping on a banana skin in the street while going to a mail box for the employer, the court held there should be no award, on the ground that the injury was due

to a risk no greater than is run by all members of the public. So also in *Slade* v. *Taylor,* 8 B. W. C. C. 65. The Scotch Courts, on the other hand, have not approved the degree of risk test. *M'Neice* v. *Singer Sewing Machine Co.,* 1911 S. C. 12; *Hughes* v. *Bett,* 1915 S. C. 150; *White* v. *Avery,* 1916 S. C. 209. In the last cited case the Lord President said: "It is common ground that the accident arose in the course of the appellant's employment. The question for our decision is whether it arose out of his employment. Now, the learned arbitrator came to the conclusion that it did not, because the risk which the appellant ran in walking upon the slippery road was not a risk to which he was exposed by the nature of his occupation, but was simply an ordinary risk to which every pedestrian was exposed. In my view that is an unsound statement of the law, for the risk on that road at that particular time appears to me to have been a risk incidental to the man's employment. And it was none the less a risk incidental to the man's employment because every pedestrian on that road at that time would have [been] required to face it, or because the appellant was facing it for the first and, it may be, the only time."

The point for English law has been set at rest by the House of Lords in *Dennis* v. *A. J. White & Co.,* [1917] A. C. 479, reversing the Court of Appeal. The claimant on his master's business had been hurt while on his bicycle in the street by a collision with a tram-car. The conclusion of the Scotch cases is approved, while the English cases above cited are expressly disapproved. The conclusion of the House of Lords would seem to be entirely proper and desirable, the English cases having adopted an unnecessarily narrow and technical meaning of the terms of the COMPENSATION ACT.

But suppose the employee is struck by lightning, or is injured by the explosion of a bomb dropped by a raiding aeroplane or Zeppelin? Perhaps but for his employment the claimant would not have been in the zone of danger. That, however, in the opinion of the learned lords is immaterial, unless the duties of his employment placed him in a position of exposure to such harms not shared by the public universally. There must still be some thread of causal connection between the employment and the injury. Working upon a steeple or high scaffold exposes one to peculiar perils from lightning, and perhaps service in a brightly illuminated building or in a munitions plant involves unusual dangers from hostile aircraft. An American employee whose duties take him to England where he is injured by such bomb would seem to receive an injury arising "out of" his employment. See *Foley* v. *Home Rubber Co.,* 89 N. J. L. 474, 15 MICH. L. REV. 606, where an award for death on the Lusitania was allowed. If it is concluded that the duties of the employment did expose the claimant to the danger, then it is wholly immaterial that others under like conditions but not under employment ran precisely the same hazard. So in the case of an employee engaged in running the engine of a threshing outfit injured by the sting of a poisonous wasp the inquiry should be as to whether the duties of such employee exposed him to such perils, not as to the degree of his risk. If an injury on the street arises "out of" one's employment because the injured party's duties took him into the street, and not because of the degree of risk run there, it would seem that the

sting of the wasp was an injury arising "out of" the employment, for it was the duty of the employee that took him out into the open where he was exposed to such perils. But see *Amys* v. *Barton,* [1912] 1 K. B. 40, where it was held that death as a result of the sting of a wasp under the circumstances suggested was not an accident arising "out of" the employment.

In *McNichol's Case,* 215 Mass. 497, the court considered the question under consideration and laid down certain tests as follows: "It (the injury) 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." Here is a clear recognition of the necessity for the causal connection. The statement has been frequently cited and quoted approvingly. *Hopkins* v. *Michigan Sugar Co.,* 184 Mich. 87; *In re Sanderson's Case,* 224 Mass. 558; *Ohio Building Safety Vault Co.* v. *Industrial Board,* 277 Ill. 96; *Hulley* v. *Moosbrugger,* 88 N. J. L. 161; *Mann* v. *Glastonbury Knitting Co.,* 90 Conn. 116; *State* v. *District Court* (Minn. 1917) 164 N. W. 1012. Quite generally the courts make the case turn upon the presence or absence of "special" or "extra" hazard beyond what other people in the same situation, aside from the employment, are exposed to, which apparently is the very consideration repudiated by the House of Lords. In *Mahowald* v. *Thompson-Starrett Co.,* 134 Minn. 113, where a teamster injured on the street was allowed compensation, the court said: "If his employment as a teamster upon the streets of a large city, where he not only had to look out for his own safety but also for that of his employer's team and rig, *necessarily accentuated the street risks to him above those to other occasional travelers* (italics ours), it suffices for the conclusion that this accident arose out of his employment". And in *Hopkins* v. *Michigan Sugar Co., supra,* where the decision perhaps could have gone on the ground that the employee when hurt was not in the "course of" his employment, the court denied an award because he had not been exposed to any more risk on the street than any other traveler. In *Beaudry* v. *Watkins,* 191 Mich. 445, however, the court allowed compensation for the death of a boy injured while on a bicycle in the street, without any mention of the extra hazard to which his employment exposed him. R. W. A.